



BAC 7710-FW-P

POSTAL REGULATORY COMMISSION

39 CFR Part 3010

[Docket No. RM2020-5; Order No. 5433]

Market Dominant Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Commission is proposing revisions to its rules concerning rate incentives for market dominant products to clarify the definition of “rate of general applicability” within the context of a market dominant price adjustment proceeding; to add an additional criterion for a rate incentive to be included in a percentage change in rates calculation at discounted prices; and to state clearly what information the Postal Service must file to support a claim that a rate incentive meets the necessary criteria to be included in a percentage change in rates calculation at discounted prices. The Commission invites public comment on the propose rules.

DATES: *Comments are due:* [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: For additional information, Order No. 5433 can be accessed electronically through the Commission’s website at <https://www.prc.gov>

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202-789-6820.

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I. Background

The Commission's rules permit the Postal Service, when adjusting market dominant rates as part of a market dominant rate adjustment proceeding, to include discounted prices for rate incentives that the Postal Service plans to offer in the percentage change in rates calculation, as long as the rate incentive meets certain criteria. 39 CFR 3010.23(e). These criteria are: (1) that the rate incentive is in the form of a discount or can be easily translated into a discount; (2) that sufficient billing determinants are available for the rate incentive to be included in the percentage change in rates calculation; and (3) that the rate incentive is a rate of general applicability. 39 CFR 3010.23(e)(2). The Commission's rules also require the Postal Service to provide "sufficient information to demonstrate that the rate incentive is a rate of general applicability." 39 CFR 3010.12(b)(9)(i).

When the Commission promulgated rules with regard to the treatment of market dominant rate incentives, it included a specific definition of "rate of general applicability" in the context of market dominant rate adjustments which provided, *inter alia*, that "[a] rate is not a rate of general applicability if eligibility for the rate is dependent on factors other than the characteristics of the mail to which the rate applies." 39 CFR 3010.1(g). The Commission explained that mail

volume sent by a mailer in a previous year is not a characteristic of the mail to which rates under an incentive program apply.¹

In the most recent market dominant rate adjustment proceeding, the Postal Service sought to include a rate incentive in the percentage change in rates calculation that featured the following terms. First, a 2-cent “base” credit per qualifying mailpiece was offered to mailers who sent out Business Reply Mail, Courtesy Reply Mail, and/or Share Mail enclosures which were subsequently returned or forwarded by the recipients.² For new participants, there was no required volume threshold in order to be eligible to participate in the incentive program. *Id.* For repeat participants, they had to meet or exceed 93 percent of their returns from the prior year in order to remain eligible. *Id.* In addition, repeat participants whose returns exceeded 100 percent of their returns from the prior year were eligible for an additional 2-cent “bonus” credit (for a total of 4 cents per qualifying mailpiece). *Id.* A question arose as to whether the “base” tier of the incentive program, the “bonus” tier, both, or neither constituted “rates of general applicability” appropriate for inclusion in the percentage change in rates calculation at discounted prices. *Id.* at 17, 19-24.

The Commission found that the Postal Service had failed to provide sufficient information to demonstrate that the rate incentive in question was a rate

¹ See Docket No. RM2014-3, Order Adopting Final Rules on the Treatment of Rate Incentives and De Minimis Rate Increases for Price Cap Purposes, June 3, 2014, at 15-16 (Order No. 2086).

² Docket No. R2020-1, Order on Price Adjustments for USPS Marketing Mail, Periodicals, Package Services, and Special Services Products and Related Mail Classification Changes, November 22, 2019, at 16-17 (Order No. 5321).

of general applicability, as required by § 3010.12(b)(9)(i). *Id.* at 22.

Nevertheless, upon considering the matter, the Commission determined that a potential ambiguity existed in the Commission's rules concerning whether a rate incentive featuring a mailer-specific volume threshold based on historical volume data could constitute a "rate of general applicability." *Id.* at 23-24. The Commission permitted both tiers of the promotion to be included in the percentage change in rates calculation in Docket No. R2020-1, but indicated that it would initiate a rulemaking to clarify this issue. *Id.*

II. Basis for Proposed Rule Change

The Commission proposes to clarify its rules by making three revisions. First, the Commission proposes to amend § 3010.1(g) to clarify that in order to qualify as a rate of general applicability, a rate cannot be based on mailer-specific data, such as historical mailer volume. Second, the Commission proposes to amend § 3010.23(e)(2) to add an additional criterion for a rate incentive to be eligible for inclusion in a percentage change in rates calculation at discounted prices—the rate incentive must be made available to all mailers equally on the same terms and conditions.

The Commission's basis for proposing these revisions is twofold. The Commission is concerned that interpreting "rate of general applicability" to permit volume thresholds based on historical volume data would contravene the policy reasons underlying the general applicability requirement, because, as the Commission has found before, "volume sent by a mailer in a previous year is not a characteristic of the mail to which rates under [an] incentive program apply[.]"

due to the fact that past behavior by mailers bears no relationship to mail being sent in the present. See Order No. 2086 at 15. The Commission is equally concerned about the fairness of permitting mailer-specific thresholds for determining eligibility for market dominant rate incentives. Where a rate incentive is not made available to all mailers on the same terms and conditions, the potential exists for non-qualifying mailers to be forced to subsidize the rate incentives received by qualifying mailers.

The third revision the Commission is proposing is to amend § 3010.12(b)(9) to add additional requirements intended to ensure that the Postal Service provides sufficient information at the outset of a market dominant rate adjustment proceeding to permit the Commission and stakeholders to verify that all rate incentives included in a percentage change in rates calculation comply with the definition of “rates of general applicability” and are made available to all mailers equally on the same terms and conditions.

III. Proposed Rule

Proposed § 3010.1(g). Proposed § 3010.1(g) is revised to state clearly that the definition of “rate of general applicability” within the context of a market dominant rate adjustment proceeding means a rate incentive that is not based on mailer-specific data, such as historical volume data.

Proposed § 3010.12(b)(9). Proposed § 3010.12(b)(9) is revised to state clearly what information the Postal Service must file to support its claim that a rate incentive meets the necessary criteria to be included in a percentage change in rates calculation.

Proposed § 3010.23(e)(2)(iv). Proposed § 3010.23(e)(2)(iv) is added to make it a criterion for a market dominant rate incentive to be included in a percentage change in rates calculation that the incentive be available to all mailers equally on the same terms and conditions.

List of Subjects in 39 CFR Part 3010

Administrative practice and procedure, Postal Service.

For the reasons stated in the preamble, the Commission proposes to amend chapter III of title 39 of the Code of the Federal Regulations as follows:

PART 3010—REGULATION OF RATES FOR MARKET DOMINANT PRODUCTS

1. The authority citation for part 3010 continues to read as follows:

Authority: 39 U.S.C. 503; 3622.

2. Amend § 3010.1 by revising paragraph (g) to read as follows:

§ 3010.1 Definitions.

* * * * *

(g) Rate of general applicability means a rate applicable to all mail meeting standards established by the Mail Classification Schedule, the Domestic Mail Manual, and the International Mail Manual. A rate is not a rate of general applicability if eligibility for the rate is dependent on factors other than the characteristics of the mail to which the rate applies, including the volume of mail sent by a mailer in a past year or years. A rate is not a rate of

general applicability if it benefits a single mailer. A rate that is only available upon the written agreement of both the Postal Service and a mailer, a group of mailers, or a foreign postal operator is not a rate of general applicability.

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3. Amend § 3010.12 by revising paragraph (b)(9) to read as follows:

§ 3010.12 Contents of notice of rate adjustment.

* * * * *

(b) * * *

(9) For a notice that includes a rate incentive:

(i) Whether the rate incentive is being treated under § 3010.23(e)(2) or under § 3010.23(e)(1) and § 3010.24.

(ii) If the Postal Service seeks to include the rate incentive in the calculation of the percentage change in rates under § 3010.23(e)(2), whether the rate incentive is available to all mailers equally on the same terms and conditions.

(iii) If the Postal Service seeks to include the rate incentive in the calculation of the percentage change in rates under § 3010.23(e)(2), sufficient information to demonstrate that the rate incentive is a rate of general applicability, which at a minimum includes: the terms and conditions of the rate incentive; the factors that determine eligibility for the rate incentive; a statement that affirms that the rate incentive will not benefit a single mailer; and a statement that affirms that the rate incentive is not only available upon the written

agreement of both the Postal Service and a mailer, or group of mailers, or a foreign postal operator.

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4. Amend § 3010.23 by revising paragraph (e)(2) to read as follows:

§ 3010.23. Calculation of percentage change in rates.

* * * * *

(e) * * *

(2) A rate incentive may be included in a percentage change in rates calculation if it meets the following criteria:

(i) The rate incentive is in the form of a discount or can easily be translated into a discount;

(ii) Sufficient billing determinants are available for the rate incentive to be included in the percentage change in rate calculation for the class, which may be adjusted based on known mail characteristics or historical volume data (as opposed to forecasts of mailer behavior);

(iii) The rate incentive is a rate of general applicability; and

(iv) The rate incentive is made available to all mailers equally on the same terms and conditions.

By the Commission.

Erica A. Barker,

Secretary.